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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY ENCINAS,

Defendant and Appellant.

B235872

(Los Angeles County
Super. Ct. No. BA378469)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Conditionally reversed with directions.

Jimmy Encinas, in pro. per., and Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, and Lance E. Winters, Senior Assistant Attorney General, for Plaintiff and Respondent.

Jimmy Encinas entered a negotiated plea of no contest to possession of a gun by a felon. He also admitted a prior strike conviction. In conformity with the plea agreement, the trial court sentenced defendant to a second strike term of 32 months in prison. Defendant's plea was based on a November 22, 2010 incident in which Los Angeles County sheriff's deputies saw defendant crossing an East Los Angeles residential street outside of a crosswalk. The deputies stopped their patrol car parallel to defendant's position on the sidewalk, and defendant stopped walking. The deputies did not tell defendant to stop. Deputy Curtis Brown got out of the car and said something like, "What's up?" Defendant responded by saying something like, "Hey, how's it going?" Brown noticed an L-shaped bulge in defendant's trousers pocket. With defendant's consent, Brown patted defendant down and recognized the L-shaped object as a gun.

Defendant moved to suppress the gun, and Brown testified at an evidentiary hearing on the motion. The sole issue was whether defendant was improperly detained at the time of the pat search. Based upon Brown's testimony that defendant voluntarily stopped walking and spoke to the group of officers, the trial court concluded it was a consensual encounter and denied the motion to suppress.

Defendant filed a timely appeal from the denial of the motion to suppress. We appointed counsel to represent defendant on appeal. After examining the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. Defendant filed his own supplemental brief.

We first address the issues raised in defendant's supplemental brief.

Defendant first wonders why Deputy Brown testified against him, whereas the booking report indicates Deputy Embledon was the arresting officer. Deputy Brown testified that Deputy Embledon and Sergeant Ellison were in the patrol car with him. Brown testified that he was the person who saw the gun and patted defendant down. His testimony amply demonstrated his personal knowledge of the facts and the trial court found it credible. No reports by any of the deputies were introduced in evidence at the hearing on the suppression motion, and thus the identity of the author of the booking

report is of no consequence to the only appealable issue: the trial court's denial of defendant's suppression motion.

Defendant next wonders why the arrest report and probable cause declaration state that the deputies saw him jaywalk if they "never stopped" him. These reports were not introduced in evidence at the hearing on the suppression motion and are thus irrelevant to the only appealable issue.

Defendant next complains that Brown was working as part of "Operation Safe Streets" and not as a traffic officer. Brown's assignment did not divest him of his status as a peace officer and is irrelevant.

Defendant next points to seeming contradictions in Brown's testimony at the suppression hearing about whether he or his partner was driving the patrol car. Brown testified that his partner was driving and parked the car, but several times on cross-examination Brown said, "I parked" parallel to defendant. At most, these purported contradictions reflected upon the credibility of Brown's testimony, but credibility determinations and the resolution of conflicts in testimony are the province of the trial court. (*People v. Leyba* (1981) 29 Cal.3d 591, 596–597.) We uphold the trial court's factual findings if they are supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182; *People v. Glaser* (1995) 11 Cal.4th 354, 362.) The trial court here found Brown's testimony credible, and substantial evidence supports that determination. The identity of the driver was collateral to the issues presented by the suppression hearing.

Defendant contends that if Brown did not "stop" defendant, he should have testified differently in response to questions that referred to him stopping defendant. The issue was whether there was an unlawful detention or consensual encounter. Brown's uncontradicted and unwavering testimony was that defendant stopped on his own accord, without request or order by any of the deputies to stop, and this constituted substantial evidence supporting the trial court's finding that defendant voluntarily stopped. It also supported the court's legal conclusion that the encounter was consensual, without regard

to whether the officers were mistaken about whether defendant had committed an infraction. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

Finally, defendant argues he was in the same position as the driver referred to in a hypothetical set forth by the court during argument on the motion. This contention has no merit. Brown's testimony constituted substantial evidence supporting the trial court's finding that defendant voluntarily stopped, which in turn supported the court's legal ruling that the encounter was consensual.

Our independent examination of the record pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, 109–110, and *People v. Wende* (1979) 25 Cal.3d 436, 441, including the trial court's in camera review of records produced by the custodian of records for the Los Angeles County Sheriff's Department on May 2, 2011, in response to the trial court's limited grant of defendant's motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, revealed that the trial court made an inadequate record to permit appellate review. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) We directed the trial court to conduct a new in camera hearing with respect to the same records, make the record required by *Mooc*, and file that record in this court under seal. The trial court held the required hearing and lodged in this court copies of the police officer personnel records it reviewed. We have reviewed these police officer personnel records and have identified three that are relevant. Because these records should have been disclosed and they may have assisted defendant with respect to his Penal Code section 1538.5 motion, denial of which is appealable notwithstanding defendant's no contest plea, we must conditionally reverse (*People v. Gaines* (2009) 46 Cal.4th 172; *People v. Hustead* (1999) 74 Cal.App.4th 410) and remand to provide defendant with the opportunity the trial court denied him.

In all other respects, we have examined the entire record and are satisfied that defendant's attorney has fully complied with his responsibilities and that no other arguable issues exist.

We note that, at defense counsel's suggestion, the trial court applied the 20 percent limitation on prison credits for persons sentenced under the Three Strikes law to defendant's presentence custody credits. Defendant was in custody for six days and was awarded one day of conduct credit. He was entitled to two days. Appellate counsel for defendant has asked the trial court to correct this error by awarding one additional day of credit, but nothing in the record indicates whether the trial court has done so. Given the uncertainty regarding the continuing viability of the judgment following the conditional reversal that we order, we merely note this error for possible future action by the trial court.

DISPOSITION

The judgment is conditionally reversed. Upon issuance of the remittitur, the trial court first is to order disclosure of the documents pertaining to the following complaints produced in the trial court by the custodian of records for the Los Angeles County Sheriff's Department on May 2, 2011 and subsequently lodged in this court: number 210794 (dated February 20, 2009), number 218746 (dated December 16, 2009), and number 219181 (dated May 10, 2010). Next, the trial court is to be directed to afford defense counsel a reasonable time to investigate the three complaints and to attempt to develop any admissible evidence as a result of their disclosure. The court then is directed to conduct a hearing affording counsel the opportunity to present evidence and argue whether the failure to disclose the complaints prior to the Penal Code section 1538.5 motion was prejudicial. If defense counsel demonstrates prejudice to the satisfaction of the trial court, the court is directed to allow defendant to withdraw his no contest plea and order a new hearing on the motion to suppress. On the other hand, if the trial court determines no prejudice occurred, it is directed to reinstate the original judgment and

sentence, which will stand affirmed. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 423.) Defendant may appeal any post-remittitur orders if the trial court reinstates the judgment. (Pen. Code, § 1237.)

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.